IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 31ST OCTOBER 2007 / 9TH KARTHIKA 1929

CRL.A.No. 879 of 2004()

SC.41/1999 of ADDL. SESSIONS COURT, (ADHOC), PALAKKAD
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APPELLANT:

VELAYUDHAN, CONVICT NO.8618,
CENTRAL PRISON, KANNUR.

BY ADV. SRI.DEEPU THANKAN

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR (SRI. NOBLE MATHEW)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY & K. HEMA, JJ.

Crl. Appeal No.879 of 2004

Dated this the 31st day of October, 2007.

JUDGMENT

Hema, J:

The appellant was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.5000/- and in default to undergo Simple Imprisonment for 2 months under Section 302 IPC, to undergo Rigorous Imprisonment for 7 years under Section 394 IPC and Rigorous Imprisonment under Section 449 IPC. The sentences were ordered to run concurrently. The said conviction and sentence are challenged in this appeal.

2. According to prosecution, on 27.5.1997 at about 3.00 p.m., the accused committed house-trespass into the house of deceased Parvathi, with intention to commit robbery and murder, snatched away the gold chain-MO1 from the neck of Parvathy and intentionally caused hurt to her, by stabbing on her neck with MO4-knife. Thereafter, he set fire to her, after pouring kerosene oil on her body and committed murder. To prove the prosecution case, prosecution examined PWs 1 to 22,marked Exts.P1 to P17 and also MO.1 to MO7. The accused did not adduce any evidence but only pleaded innocence when questioned under Section 313 Cr.P.C.

3. The court relied upon the following circumstantial evidence: (1) the alleged strange conduct of the accused, as revealed by the evidence of PW8, (2) the recovery of MO1-gold chain from PW12, (3) the recovery of

MO.2 series and MO.3 series from the house of accused, (4) recovery of MO.4 -knife, the weapon of offence from the residential compound of the accused, (5) recovery of blood stained lunki, MO7 from the house of the accused which was alleged worn by him of occurrence. Taking the said circumstances as proved, the court below came to the conclusion that the accused committed the offences alleged against him and that the chain of circumstances are proved which bring home the guilt of the accused. Such findings, the conviction and sentence are challenged in this appeal.

4. To prove the prosecution case, there is only circumstantial evidence. Those are as follows:

(i) The recovery of MO1 gold chain belonging to the deceased, at the instance of the accused as produced by PW12;

(ii) The recovery of the weapon of offence, MO4 pursuant to a disclosure statement made by the accused to PW21, the investigating officer;

(iii) The recovery of MO7-lunki allegedly worn by the accused from his own house ; and

(iv) The conduct of the accused in proceeding to the house of the deceased to see the dead body but returning mid-way, without seeing it, as revealed from the evidence of PW8.

5. Now, coming to the first and foremost circumstantial evidence noted above, viz., recovery of MO1 gold chain, the prosecution examined PW1, 6 and 7, who are the close relatives of the deceased to establish firstly that MO1 belonged to deceased Parvathi. But the evidence of the close relatives on this aspect is contrary to each other. PW1 is the paternal nephew of deceased Parvathi. He categorically stated in cross-examination that he had not seen deceased Parvathi wearing any chain at any time. There is absolutely no reason to disbelieve PW1, since nothing has been brought out from his evidence to show that he was deliberately speaking falsehood to help anyone particularly.

6. PWs 6 and 7 are the nieces of deceased Parvathi on the maternal side. PW6 is the deceased's brother's daughter and PW7 is the deceased's sister's daughter. Both of them stated in evidence that deceased used to wear MO1 gold chain. PW6 identified MO1 as the gold chain belonging to deceased Parvathi. PW7 also gave evidence in the same lines and identified MO1 as the deceased 's chain. But , the evidence of PWs 6 and 7, which is contrary to the evidence of PW1, (who is also a close relative of deceased Parvathi), does not reveal whether deceased Parvathi was in possession of MO1 on the date of occurrence or on the previous day. PW6 stated that she was residing at Coimbatore which is away from the place of residence of the deceased. PW7 also resides away from the deceased's house. But, PW1 who stays closer to the deceased stated that he had not seen her wearing any chain at any time.

7. In this context, the evidence of the neighbouring witnesses regarding possession of the chain MO1 is also relevant. The records reveal that PW5 was cited to prove that deceased Parvathi was found wearing the chain on the previous day, when the former went to the latter's house to fetch water. But when examined in court, PW5 was silent about any such visit being made by the deceased in her house, on the previous day. It is also relevant to note that though PW5 deposed vaguely that she used to see deceased wearing chain, she did not know the model of the chain or whether it was of gold. She could not confirm whether MO1 was the chain which belonged to deceased Parvathi. Therefore, the evidence of of the neighbours is not quite convincing and at any rate, it does not disclose that the deceased Parvathi was found wearing the chain at any time in the recent past, prior to the occurrence.

8. Now, the evidence relating to the recovery of MO1 from the jewellery shop of PW12 can be looked into. According to prosecution, the accused gave a statement to the investigating officer PW21 that the gold chain which was stolen from the possession of deceased was given to the shop of PW12 and as lead by him, the investigating officer went to the shop of PW12 while the latter produced MO1 to PW21. If the evidence adduced by the prosecution is believed, the alleged stolen property comes from the possession of PW12. PW12 is the person from whose possession MO 1 was recovered. The evidence of PW12 has therefore to be viewed

seriously and it has to be analysed with greater care and caution because, PW12 will normally have a tendency to shift the responsibility of possession of the alleged stolen gold chain to some other person, since t is incriminatory to the witness himself. PW12 will therefore have interest in absolving himself from the criminal liability, on being aware that MO1 is an alleged stolen chain. Therefore, this court will seek corroboration to the evidence of PW12 before it is acted upon. But, the evidence of PW12 is not corroborated by any independent evidence. Nobody from the shop or nearby place was examined to support the evidence of PW12 that MO1 was handed over by the accused to him on 30th, ie., on the third day of the incident.

9. PW12 deposed that the accused had given MO1 to his shop. But his evidence discloses that he used to enter the names and other details of the person who sells ornament to him in the shop in a book but the name of the accused was not entered or noted down anywhere. He was only speaking from memory and he has no explanation why the details of the accused were omitted to be noted down in the book as usually being done. It has also been stated by PW12 that he was running the jewellery shop, but, he stated that he was not maintaining any sales tax register and that he was also not paying any sales tax. In the above circumstances, the evidence of PW12 is doubtful whether MO1 was given by the accused to PW12, as alleged by him. At any rate, the evidence of PW12 does not inspire confidence in the mind of the court to act upon the same to hold that the

accused had sold MO1 to PW12, especially in the absence of any corroborative piece of evidence.

10. The evidence of PW21, the investigating officer also does not reveal that the exact nature of information which was allegedly given by the accused to PW12, which led to the alleged recovery of MO1 from the shop of PW12. In such circumstances, the evidence of PW12 does not gain any support from the evidence of PW21 and hence, it is dangerous to act upon the evidence of PW12 alone to hold that the most of the incriminating piece of evidence that the alleged stolen chain MO1 was handed over by the accused to PW12.

11. Learned Public Prosecutor, however, pointed out that the statement which was allegedly given by the accused to the investigating officer was recorded in the mahazar and hence, it can be accepted as the information which is relevant under section 27 of Evidence Act. But it is well settled that investigating officer has to depose in court as to the exact information given by the accused to him, which has led to the discovery of the relevant fact which is admissible under Section 27. But, such statement or evidence regarding the exact information given by the accused to PW21 which has led to the recovery of material fact is totally absent in this case. A statement which is made in writing which finds a place in the recovery mahazar will not prove the fact, as required under Section 27 of the Evidence Act. Therefore, prosecution has not established that MO1 which is the alleged stolen gold chain was in possession of deceased Parvathi

immediately prior to the occurrence or on the previous day of the occurrence and that it was in possession of the accused on 30.5.1997, as alleged by the prosecution. It is also not conclusively proved that MO1 was handed over by the accused to PW12. The alleged fact which is sought to be proved relating to recovery of MO1 could not be proved by the prosecution satisfactorily.

12. The next circumstance is the recovery of the alleged weapon of offence. According to prosecution, MO4-knife was used by the accused, for inflicting injuries on the neck of deceased Parvathi for the commission of robbery. The prosecution case is that injuries were inflicted by the accused on deceased Parvathi with MO4-knife. But, there is no direct evidence prove this fact. The infliction of injury by a particular weapon can be well established by medical evidence. But, the medical evidence adduced in this case through the evidence of PW22 and the post mortem certificate, Ext.P16 will not disclose that any injuries were inflicted on the deceased Parvathi with MO4. The evidence of PW22 and Ext.P16 will not reveal that any injury which could be caused by MO4 was found on the dead body of deceased Parvathi. PW22 noted deep burns involving the entire body and also multiple heat ruptures present over the neck, chest, both shoulders, back of trunk and buttocks.

13. But PW22 has no case that any of the injuries found on the deceased Parvathy could be caused by a weapon like MO4. Though it was brought out from his evidence that heat ruptures which were noted on the neck and other parts of the body of the deceased, there is nothing in

evidence to show that such injuries could be caused by MO4 weapon of offence, which is allegedly used by the accused. MO4 was not even shown to the doctor and nothing was elicited from his evidence to show that the injury which the doctor described as heat ruptures on neck etc., were caused by stabbing with MO4. Therefore, the prosecution has miserably failed to establish through medical evidence that any injury was caused to deceased Parvathi by stabbing with MO4, as alleged.

14. Learned Public Prosecutor pointed out that the inquest report would reveal that there were stab injuries on the neck of Parvathi. It is true that in Ext.P2, the police officer who has conducted inquest, had noted that there was a circular wound having a measurement of 2 cm on the left side of the neck. It is also noted in Ex P2 that just below the said injury, there was something measuring 1 cm. which "looked like" an injury but, the doctor explained that those were heat ruptures. The investigating officer himself did not depose before court that those injuries were stab wounds. But the description in the inquest report Ext.P12 only reveals that there was some mark which was akin to injury.

15. A reading of the inquest report and the evidence of the investigating officer PW21 coupled with the evidence of PW22 will not lead to the conclusion that the injuries found on the neck were stab wounds. In the absence of any injury being sustained by deceased Parvathi which could be caused by MO4, the recovery of the said weapon at the instance of

the accused will not be incriminating against the accused. Still, we will consider in detail, the evidence relating to recovery of MO4.

16. As noted earlier, PW21, the investigating officer did not state in court the information which was allegedly given by the accused to him, which has lead to the recovery of MO4. Therefore, the evidence of PW21 does not reveal anything which is admissible under section 27 of the Evidence Act. But the fact remains that PW21 deposed that the knife was recovered , as taken out by the accused from his compound and MO4 was identified as the said knife. An attestor to the mahzar under which MO4 was recovered was examined and Ext.P7 is the mahazar.

17. PW14 is an attestor to Exxt.P7 mahazar but he could not say the exact place from where accused allegedly took out the weapon. A suggestion was made that he was unable to state the details since he had not seen the actual incident. PW14 was not even able to say the direction in which the house was situated or the property was situated from where the knife was recovered. The distance from the gate to the place from where knife was recovered also could not be stated by him even approximately. Therefore, it is doubtful whether the knife was recovered as alleged by the prosecution at the instance of the accused. At any rate, the blood stains found on MO4 and the recovery of MO4 at the alleged instance of the accused will not connect the accused with the crime, so long as there is no evidence to reveal that any injury was inflicted on the deceased Parvathi, by using MO4, as alleged by the prosecution.

18. The next circumstance relied upon by the prosecution is the recovery of MO7-lunki worn by the accused allegedly at the time of occurrence. The said lunki was recovered under Ext.P8 mahazar as disclosed from the evidence of PW21, investigating officer. But, there is nothing in evidence to show whether MO7-lunki was worn by the accused at the time of occurrence. The investigating officer has not given any evidence touching this aspect, regarding any alleged statement or information given by the accused to him which has led to the recovery of MO7. Nobody had identified the lunki as the one worn by the accused on the date of occurrence. Though the accused's wife and another person(PW8) who saw the accused rushing towards his house after the incident were examined, MO7 was not proved as the dress worn by him on the crucial day.

19. But, prosecution is now relying upon he conduct of the accused in effecting the recovery of MO7, as an incriminating piece of evidence against him. According to prosecution, the lunki was taken out by the accused from the room of the accused in his house and produced before the Investigating officer. The accused had allegedly given a statement to PW21 that the lunki was kept in the room of his house and led him to the said place and produced the same.

20. But, the alleged information given by the accused to PW21 leading to the recovery of lunki is not proved in this case, as required under section 27 of the Evidence Act. PW21 did not mention in his evidence , what the

said statement was. The alleged conduct of the accused also cannot be treated as an icriminating piece of evidence, because the recovery of lunki could have been made by PW21, even without the aid of the accused. As per evidence, the lunki was not concealed in any place, but it was kept in the room which could be visible to any person. The Investigating Officer could have siezed the article, even without it being taken out by the accused. Therefore, it cannot be conclusively held that the alleged conduct in leading PW21 to the house of the accused and producing the lunki from the room is a conclusive incriminating piece of evidence against the accused, pointing to his guilt.

21. Consequently, the report of the chemical analyist regarding presence of blood on the MO7-lunki will also not be of much help to the prosecution to connect the accused with the crime, as a circumstance revealing his guilt, especially since there is absolutely nothing in evidence to show that the said lunki was worn by the accused at the time of occurrence. The Chemical Analyist's report also does not show to which group the blood on MO7 belongs. Thus, the recovery of MO7, in the absence of proof of the alleged information given by the accused to PW21, that too, from a place which could be reached even without the accused taking him there, is of no help to conclude the guilt of the accused. MO.7 was not kept in a concealed state also.

22. The last piece of circumstantial evidence relied upon by the prosecution is the alleged strange conduct of the accused, as revealed from the evidence of PW8. The prosecution case is that PW8 who is a salesman of toddy shop and the accused had gone to the shop on the crucial day. PW8 stated that the accused and another person accompanied him to house of the deceased to see the dead body on getting information, but on the mid-way, the accused went back, without seeing the dead body. The said conduct of the accused in returning, without seeing the dead body, according to prosecution, is a strange conduct which discloses guilty mind. In the absence of any other piece of evidence against the accused, which is incriminatory in nature, the only evidence of PW8 which may reveal that the accused returned half-way without seeing the dead body alone cannot be treated as a circumstance disclosing the guilty mind of the accused because this conduct can be explained on several other hypothesis which may not indicate his guilt.

23. In this context, it is relevant to note that the evidence of PW5, who is an important witness examined by the prosecution reveals that she is the closest neighbour of deceased Parvathi but, she had not gone to the house of Parvathi to see the dead body. Therefore, it all depends upon the temperament of each person to make up his mind whether to go and watch the dead body, especially since the body was in a charred condition, which may not be a pleasant sight. The fact revealed from the evidence of PW8

may only show that accused had decided to see the dead body and accompanied him to the deceased's house, but for some reason or other, he returned without seeing the dead body, on reaching half-way through. The above fact alone cannot be said to be an incriminating circumstantial evidence pointing to the guilt of the accused.

24. It is also relevant to note that the evidence of PW8 reveals that the conduct of the accused was brought out in evidence, as per a leading question put to him in the chief examination. A portion from the case diary statement is seen put to the witness and it is recorded by the court as a quotation, within inverted comas and the witness answered that the accused might have accompanied him. As per law, the answer given to such question is to be eschewed from evidence. It is also to be noted that despite this, PW8 had not asserted the said conduct of the accused but he only gave evidence, 'it might be'. In such circumstances, the evidence of PW8 by itself may not be sufficient to hold that the accused was strange in his behaviour, so as to conclude his guilt.

25. Summing up the discussion, we hold that the prosecution failed to establish the alleged circumstances which are held against the accused as incriminating, and his guilt has not been proved. The accused is, therefore, entitled for an acquittal of all the offences alleged against him.

The conviction and sentence passed against the appellant-accused are therefore, not sustainable and are set aside. The appellant is found not guilty of offences under Sections 449, 394 and 302 IPC and he is acquitted

of all the said offences. He is set at liberty forthwith, if his detention is not in any other case. The Registry shall issue release memo to jail authorities concerned immediately.

This appeal is allowed.

J.B.KOSHY, JUDGE.

K.HEMA, JUDGE.

Krs.

J.B. KOSHY & K. HEMA, JJ.

Crl. Appeal No.879 of 2004

Dated this the 31st day of October, 2007.

JUDGMENT